UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARIO LONDONO-TABAREZ,

Movant,

-against-

07 Civ. 3572 (DAB)
00 Crim. 556 (DAB)
MEMORANDUM & ORDER

UNITED STATES OF AMERICA,

Respondent.
----------X
DEBORAH A. BATTS, United States District Judge.

Mario Londono-Tabarez ("Movant") is presently serving a 188 month sentence of imprisonment after having been convicted by a jury on August 16, 2001 of participating in a narcotics conspiracy involving the possession and distribution of more than five kilograms of cocaine, in violation of 21 U.S.C. § 846. At trial, the Government presented ample evidence of both the existence of the conspiracy and of Movant's participation in it. The Government's evidence included testimony from a cooperating witness and intercepted telephone conversations in which Movant and co-conspirators discussed narcotics transactions using euphemisms and code words. Movant testified in his own defense, denying the existence of the narcotics conspiracy.

The Second Circuit Court of Appeals affirmed Movant's conviction and sentence in a Summary Order dated January 12, 2005. See United States v. Londono-Tabarez, 121 Fed. Appx. 882

(2d Cir. 2005). Upon the Court of Appeals' remand of the case, pursuant to United States v. Booker, 543 U.S. 220 (2005) and United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), the Court re-imposed the original sentence of 188 months in an Order dated June 14, 2005. In a Summary Order dated February 2, 2007, the Court of Appeals affirmed the re-sentencing. See United States v. Londono-Tabarez, 216 Fed. Appx. 71 (2d Cir. 2007).

At a sentencing hearing on September 23, 2002, the Government urged the Court to impose a two-level increase to Movant's total offense level for obstruction of justice, pursuant to U.S.S.G. § 3C1.1. The Court noted that Movant very likely testified falsely at trial, but declined to make a finding that he did so. (Tr. of September 23, 2002 at 8:20-25 & 9:1-4 & 10:2-16.) Had the Court imposed a two-level increase, Movant would have faced a sentencing range of 235 to 293 months. Movant now asks the Court to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255, raising claims of ineffective assistance of counsel and prosecutorial misconduct. Movant also requests an evidentiary hearing in connection with his motion. Such a hearing is unnecessary. For the reasons set forth, the instant Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is DENIED in its entirety.

I. BACKGROUND

Movant claims that he was denied the Sixth Amendment's guarantee of effective assistance of counsel as a result of his attorney's failure to obtain a plea offer from the Government or to counsel him of the benefits of pleading guilty and because the attorney failed to object at trial to the Government's introduction of co-conspirators' guilty plea allocutions. (Mot. at 7-8 & 10-11.) Movant also claims that the Government engaged in misconduct at trial by introducing portions of his co-conspirators' guilty plea allocutions into evidence and eliciting certain testimony from its expert witness. (Id. at 11.)

Harold Pokel, Esq. represented Movant during pre-trial proceedings as retained counsel and at trial as an attorney appointed under the Criminal Justice Act (the "CJA"). Movant has submitted an affidavit along with the instant motion in which he states as follows:

> [P]rior to trial, attorney Pokel never provided me with any plea agreement offer from the government, did not discuss the strength or weakness of the government's case, did not explain to me the consequences of a conviction entered by jury verdict or guilty verdict, as it related to possible penalties, did not discuss the Federal Sentencing Guidelines and its application to me any my case as it related to a conviction by jury verdict [or] guilty plea, and did not fully and constitutionally advise me as to what pleas to enter.

(Affidavit ¶ 3.) He states that he would have pled guilty had his attorney advised him fully of these issues. (Id. ¶ 4.) Movant does not claim, however, that the Government ever made any plea offers to his attorney that the attorney then failed to communicate to him. Indeed, the Government represents that the Government never made a plea offer to Movant's counsel. (Opp. at 21.)

Approximately one month before Movant's trial was scheduled to begin -- on August 6, 2001 -- the Court held a conference on June 28, 2001 to discuss several issues that Movant had raised with respect to his attorney and the impending trial. During the course of that conference, at which a court-certified interpreter was present, Movant expressed confusion as to why he was required to proceed to trial. (Tr. of June 28, 2001 at 5:23-24.) Mr. Pokel informed the Court that Movant "doesn't understand why he continues to be charged in this case." (Id. at 6:23-24.) The Court inquired what Movant meant by that, whereupon the following colloquy took place:

> Mr. Pokel: When he is actually innocent, that the charges should not have been brought or they should have been dismissed since he is innocent.
>
> The Court: I see.
>
> Mr. Pokel: At least that is what I think he means by that.
>
> The Court: Wait a second. Is that what you mean?

Defendant Londono-Tabarez: Yes, your honor.

The Court: You are innocent?

Defendant Londono-Tabarez: I am innocent. I am innocent.

(Id. at 7:1-11.) The Court then explained to Movant why a trial had been scheduled in his case and asked him if he understood the explanation:

> The Court: Let me explain one of your questions. You say you say you are innocent. The government believes it has sufficient evidence to prove you are guilty beyond a reasonable doubt. You have been charged in an indictment which was returned by a grand jury that found probable cause to believe that you did what was charged in the indictment, and that is why you are where you are.
>
> You have an opportunity to defend against the charges by going to trial. So in responding to your question you don't understand why you're going to trial, the government would be put to its proof. It will have to prove beyond a reasonable doubt that you are guilty of what the charges say. You don't have to do anything, but it puts the government to their proof to do that.
>
> One other alternative that you have, which would mean you don't have to go to trial, would be if you accepted and acknowledged guilt and pled guilty, then you would not go to trial, but then you would be sentenced. Those are the two options. If you maintain your innocence, then clearly the only option to you is to put the government to its proof by going to trial. Do you understand that?
>
> Defendant Londono-Tabarez: Yes, your Honor.
>
> The Court: Does that answer that question about why you're going to trial?
>
> Defendant Londono-Tabarez: Yes, your Honor.

(Id. at 7:12-25 & 8:1-11.) Thereafter, the Court noted that two of Movant's co-defendants planned to plead guilty prior to the

August 6, 2001 trial date but that since Movant "has stated he is innocent, it would seem to me that we are going to trial on the 6th." (Id. at 18:3-9.) Accordingly, the Court advised all counsel present at the conference of the submissions schedule for voir dire requests and requests to charge. (Id. at 19:7-11.)

The Court continued the conference to hear additional issues raised by Movant following a recess during which a member of the Southern District of New York's CJA panel, David Touger, Esq., and Mr. Pokel had conferred with Movant through the court-certified interpreter. Mr. Touger explained to the Court that Movant wished to request an adjournment of the trial date, even though the date had been set at a conference on April 2, 2001 without objection by either Movant or his attorney. (Id. at 23:9-12.) Mr. Touger advised the Court that he had explained to Movant that "as the innocent person he professes to be, there are no motions to be made. There is no motion, 'I'm innocent, the case should be dismissed.'" (Id. at 23:22-25.) Nevertheless, Movant told Mr. Touger that if the Court refused to postpone the trial, then he would insist on replacing his attorney, Mr. Pokel. (Id. at 25:12-23.) Alternatively, Movant advised he would consider proceeding to trial on the date scheduled with Mr. Pokel as his counsel if he did not have to pay for Mr. Pokel's services. (Id. at 28:3-14.) The Court denied the request to

adjourn the start of the trial but permitted Movant to file a financial affidavit to determine whether he might qualify for appointment of counsel under the CJA. Based on the information provided in Movant's affidavit, the Court appointed Mr. Pokel, a member of the CJA panel in the Eastern District but not in the Southern District, pro hac vice and under the CJA to represent Movant at trial. Based on this arrangement, Movant advised the Court that he had "no problem continuing with Mr. Pokel." (Id. at 30:12-13.)

Before adjourning the June 28, 2001 conference, the Court again advised Movant and his counsel that the options were to either proceed to trial or reach a disposition with the government beforehand:

> The Court: Then, the only other thing I need to inform Mr. Pokel and Mr. Londono about is that it is my understanding, as we are here today, that we are going to trial in this matter on Monday, August 6th, at 9:30 am, when we start to select the jury.
>
> As Mr. Pokel works with Mr. Londono in preparation for his defense at trial, obviously with the assistance of an interpreter at all times, should Mr. Londono determine that it is in his best interests to dispose of this case by plea rather than trial, I wish to advise you that the court needs to be informed of that no later than Friday, July 13th should Mr. Londono wish to avail himself of the credit for acceptance of responsibility and saving the government and the court the need for preparing for trial.
>
> So that if Mr. Londono determines it is in his interests to plead guilty because he is guilty, then the court -- obviously the government primarily -- and the court should be informed of that no later than Friday, July 14th at 4:00 pm.

> Do you understand, Mr. Pokel?
>
> Mr. Pokel: Yes, I do.
>
> The Court: I trust that you already have, but that you will again explain to Mr. Londono what the significance of that date is in terms of his offense level should he decide to plead, that it would have some benefits . . . to do it by that date.
>
> Mr. Pokel: I certainly will.

(Id. at 32:14-25 & 33:1-15.) Following the conference, Movant did not plead guilty, proceeded to trial on August 6, 2001 and was convicted by a jury on August 16, 2001.

II. DISCUSSION

A. Ineffective Assistance of Counsel Claim for Failure to Obtain Plea Offer or to Advise of the Benefits of Pleading Guilty

To prevail on a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. § 2255, on the basis of ineffective assistance of counsel, a convicted defendant must meet the stringent, two-part test articulated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). See e.g. Morales v. United States, 143 F.3d 94, 96 (2d Cir. 1998). Under Strickland the defendant must first demonstrate that his counsel's performance fell below "an objective standard of reasonableness" in light of prevailing professional norms. 466 U.S. at 687-88. In addition, the defendant must demonstrate that

counsel's deficient performance prejudiced the defense such that there exists a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In the context of whether a defendant should plead guilty, the Second Circuit Court of Appeals has held that effective assistance of counsel means that defense counsel "'must give the client the benefit of counsel's professional advice on this crucial decision.'" Boria v. Keane, 99 F.3d 492, 497 (2d Cir. 1996) (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases (1988)) (emphasis omitted). Thus, "[e]ven if there might be circumstances where defense counsel need not render advice as to acceptance of a plea bargain, there can be no doubt that counsel must always communicate to the defendant the terms of any plea bargain offered by the prosecution." Cullen v. United States, 194 F.3d 401, 404 (2d Cir. 1999). Although the ultimate decision to plead guilty must be made by the defendant, in providing advice, defense counsel "may take into account, among other factors, the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea

(whether or not accompanied by an agreement with the government), whether the defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." Purdy v. United States, 208 F.3d 41, 45 (2d Cir. 2000).

Objectively adequate performance of counsel in the plea bargaining context does not necessarily require "that the defendant have counsel who recommends that a plea bargain be pursued." Brown v. Doe, 2 F.3d 1236, 1246 (2d Cir. 1993) (citation omitted). A "wide range of reasonable professional" conduct is deemed to be sufficient in this context. Id. Thus, the Supreme Court has recognized that "[i]f counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance." United States v. Cronic, 466 U.S. 648, 657 n.21, 104 S.Ct. 2039, 2046 n.21 (1984). A clear example of objectively deficient performance is a defense counsel's failure to convey a plea offer to her client. See Cullen, 194 F.3d at 404.

On the other hand, demonstrating prejudice based on ineffective assistance of counsel in the plea bargain context requires that "the defendant must establish a reasonable probability that, if he had been given complete and accurate information, he would have pled guilty instead of going to

trial." United States v. Bicaksiz, 234 F. Supp.2d 202, 204 (E.D.N.Y. 2002) (citing Aeid v. Bennett, 296 F.3d 58, 62 (2d Cir. 2002)). The Second Circuit has recognized that "where the disparity in potential sentences is great, a finder of fact may infer that defendants who profess their innocence still will consider a plea." United States v. Pham, 183 F.3d 178, 183 (2d Cir. 2003). Although a defendant's protestation of innocence prior to trial is not entirely dispositive of whether a defendant would have accepted a plea offer, it is a factor to be considered on an ineffective assistance of counsel claim. See Cullen, 194 F.3d at 407 ("Though [the defendant's] insistence on his innocence is a factor relevant to any conclusion as to whether he has shown a reasonable probability that he would have pled guilty, it is not dispositive").

Movant asserts that he would have pled guilty had his attorney, Mr. Pokel, properly advised him. (Affidavit ¶¶ 3-4.) Although he states that no plea offer was ever communicated to him, it is clear that is because the Government never made any such offer to Mr. Pokel in the first place. In any event, Movant does not state in his affidavit that Mr. Pokel failed to pursue the possibility of a plea bargain. Movant claims instead that Mr. Pokel did not advise him of the potential consequences of proceeding to trial as opposed to pleading guilty. (Id. ¶ 3.)

However, at the June 28, 2001 conference -- approximately a month before the trial commenced -- Movant received extensive advice from Mr. Pokel, as well as from another attorney, Mr. Touger, on the status of his case and regarding the impending trial. The Court, moreover, explained to Movant at that conference why a trial had been scheduled and that he had the option of pleading guilty to avoid trial if in fact he was guilty. (Tr. of June 28, 2001 at 7:12-25 & 8:1-7 & 33:3-7.) The Court also advised Movant that he could qualify for a reduction of his total offense level if he chose to plead guilty in a timely fashion. (Id. at 33:10-14.) Mr. Pokel advised the Court that he would discuss benefits of pleading guilty to Movant as well. (Id. at 33:15.) The Court finds, therefore, that Mr. Pokel's representation in the context of plea bargaining was reasonable and constitutionally sufficient.

The Court ultimately sentenced Movant, after declining to enhance his sentence for perjury committed at trial out of consideration for his family, at the low end of the applicable 188 to 235 month incarceration range. Had Movant pleaded guilty prior to trial and received credit for acceptance of responsibility, he would have faced a sentencing guideline incarceration range of 135 to 168 months and a mandatory minimum sentence of 120 months' imprisonment. (Opp. at 21.) The

difference between 188 month sentence that this Court imposed and the range of sentencing that Movant would have faced had he pled guilty does not give rise to an inference of prejudice despite Movant's assertion that he would have taken an offer. See, e.g. Bicaksiz, 234 F. Supp.2d at 205 (finding that defendant could not demonstrate sufficient prejudice where "the guidelines called for a sentence at level 36, of 188 to 235 months" but had defendant "pled to the indictment, and received three levels off for acceptance of responsibility, the offense level would have been 33, and the range would have been 135 to 168 months").

Movant steadfastly insisted that he was innocent of the charge, both prior to and at trial. At the June 28, 2001 conference, Movant declared to the Court that he was innocent. (Tr. of June 28, 2001 at 7:8-9.) At trial, he testified under oath that he had never discussed cocaine transactions with his co-defendants or had ever heard anyone else discuss cocaine transactions either. (Tr. of August 14, 2001 at 969:12-25; Tr. of August 15, 2001 at 1000:20-25 & 1001:1-4.) Movant also flatly denied that he was a member of the narcotics conspiracy charged in the Indictment. (Tr. of August 14, 2001 at 974:23-25 & 975:1-5.) Given his vehement protestations of innocence prior to and at trial, coupled with the fact that the Government never made him an offer, the Court finds incredible the assertion Movant now

makes that he would have pled guilty if he had been provided an offer or counseled to do so. See Gluzman v. United States, 124 F. Supp.2d 171, 178 (S.D.N.Y. 2000) ("Where the government does not offer a plea, and where the client insists that she did not participate in the crime, a failure successfully to negotiate a plea does not amount to ineffective assistance of counsel"). Additionally, the Court notes that Movant's "persistent claims of innocence would have rendered highly problematic [his] ability adequately to allocute in view of the requirements of Fed. R. Crim. P. 11." Id. at 178. The Court thus finds that, in addition to failing to demonstrate the objective deficiency of his attorney's performance, Movant cannot demonstrate that he has suffered prejudice necessary to sustain his ineffective assistance of counsel claim. Accordingly, the Motion to Vacate, Set Aside or Correct Sentence on the basis of Movant's attorney's performance in the context of plea bargaining is DENIED.

Movant's claim that his attorney provided ineffective assistance in the context of plea bargaining is the only one raised in the instant motion under 28 U.S.C. § 2255 that might potentially require further factual development. Nevertheless, the Court finds that an evidentiary hearing is unnecessary because "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."

28 U.S.C. § 2255. Movant's request for an evidentiary hearing is therefore also DENIED.

B. Ineffective Assistance of Counsel Claim for Failure to Object to the Government's Offer of Co-conspirators' Guilty Plea Allocutions as Evidence

Movant claims that his attorney provided ineffective assistance at trial by failing to object when the Government "introduced portions of the guilty plea allocutions of two of Movant's [co-conspirators], Carlos Zapata and Mario Granados. (Mot. at 10.) This claim fails since Movant can neither demonstrate that counsel's conduct was unreasonable at the time nor that any prejudice resulted to the defense. As the Government cogently points out, "[i]t was well-settled at the time of trial that guilty plea allocutions were admissible" as evidence. (Opp. at 23 (citing United States v. Tropeano, 252 F.3d 653, 658 (2d Cir. 2001)). The Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), was issued three years after the trial. Moreover, the Second Circuit Court of Appeals held that the admission of Movant's co-conspirators' plea allocutions "were entirely cumulative" and that "their admission was harmless" error. United States v. Londono-Tabarez, 121 Fed. Appx. 882, 883 (2d Cir. 2005).

Accordingly, the Motion to Vacate, Set Aside or Correct Sentence on this basis is DENIED.

C. Claims of Prosecutorial Misconduct

Movant's claims that the Government improperly introduced his co-conspirators' guilty plea allocutions into evidence and improperly elicited expert testimony at trial on the meaning of certain code-words used by the defendants in the course of their narcotics conspiracy are entirely without merit. As discussed above, at the time of trial, the guilty plea allocutions of co-conspirators were admissible evidence. The Government did not act improperly in seeking to introduce such evidence. As for the expert testimony introduced by the Government, it too was permissible at the time of trial. The Second Circuit observed that portions of the expert witness' testimony were "problematic" and should not have been permitted, but only in light of its subsequent precedents in United States v. Dukagjini, 326 F.3d 45, 55 (2d Cir. 2003) and United States v. Tommy Cruz, 363 F.3d 187, 196 (2d Cir. 2004). See United States v. Londono-Tabarez, 121 Fed. Appx. 882, 884 (2d Cir. 2005). The Second Circuit ultimately concluded, however, that the admission of those portions of the expert witness' testimony was harmless error. Id. at 885. The Government therefore did not act improperly in

introducing the expert witness' testimony. Accordingly, the Motion to Vacate, Set Aside or Correct Sentence on the grounds of prosecutorial misconduct at trial is DENIED.

III. CONCLUSION

For the foregoing reasons, the instant Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is DENIED in its entirety. Further, since Movant has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability SHALL NOT ISSUE. See 28 U.S.C. § 2253(c)(2); Lozada v. United States, 107 F.3d 1011 (2d Cir. 1997), abrogated on other grounds by United States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997). Should Movant seek to appeal in forma pauperis, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Memorandum and Order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962). The Clerk of Court is directed to close the docket in the above-captioned civil case and to serve a copy of this Memorandum and Order on the Government and the Movant.

SO ORDERED.

Dated: New York, New York
January 2, 2008

Deborah A. Batts
Deborah A. Batts
United States District Judge